No. 821

MAR 6 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM L. CLAY, *et al.*,

Petitioners,

vs.

DOMINION OF CANADA,

Respondent.

WILLIAM L. CLAY, JR.,

Petitioners,

vs.

DOMINION OF CANADA,

Respondent.

ANGELO R. SANTORA,

Petitioner,

vs.

HER MAJESTY ELIZABETH as of right Queen of Canada, and Canada,

Respondents.

ARTHUR SHAUGHNESSY and ANNE SHAUGHNESSY,

Petitioners,

vs.

HER MAJESTY ELIZABETH QUEEN OF CANADA and CANADA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN W. GUZZETTA,
Attorney for Petitioners,
Office and Post Office Address,
First National Bank Building,
Mount Vernon, N. Y.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above entitled cases on December 7, 1956. The questions presented in each case are the same.

Citations to Opinions Below

The memorandum decision of the District Court applying in each of these cases (R. 14a-23a), is reported in 144 F. Supp. 746. The affirmance, without opinion, of the Circuit Court of Appeals (R. 37a, 38a), printed in Appendix B hereto, pages 10-25, is reported in 238 F. 2d 400.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 7, 1956 (R. 39a-46a; pp. 22-25, infra). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

Pursuant to authority of Laws of 1902, Chapter 1123 (pp. 26-29), the Secretary of War of the United States gave conditional consent to the defendant, Canada, to construct a dam in the St. Lawrence River from Canadian territory to United States territory (Appendix C, pp. 26-29). The condition relevant here, was:

> "2. That if the construction and operation of the said dam shall cause damage or detriment to the property

owners of Les Galops Island, or to the property of any other citizens of the United States, the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damages may be brought."

The consent was acted upon. The dam was built. These actions were brought in The District Court by citizens of the United States, against Canada, to recover substantial damages alleged to have been caused to their properties by reason of the construction and operation of the dam. The Federal Rules make no provision for a method of service of process on a sovereign foreign state. In each of these cases a copy of the summons and complaint was delivered to the Consul General of Canada, at his office in New York. The questions presented are:

1. Whether the defendant, Canada, in constructing the dam and accepting the condition, waived immunity to suit in actions contemplated by the condition above quoted.

2. Whether the defendant, Canada, in constructing the dam and accepting the condition, agreed to accept service of process in actions contemplated by the condition above quoted.

3. Whether, in the circumstances, service of process in each of these actions by delivering a copy of the summons and complaint to the Consul General of Canada, at his office in New York, was service sufficient to give the District Court jurisdiction.

Statutes Involved

The statutory provisions involved are Chapter 425 of the Laws of 1899, Section 9 (30 Stats. L. 1151); Chapter 1123 of the Laws of 1902 (32 Stats. L. 392), and Federal Rule 4 (d). They are printed in Appendix A, infra, pp. 7-9. Also involved are two separate conditional approvals given by The Secretary of War and Acting Secretary of War, pursuant to 32 Stats. L. 392 (supra), of plans and modified plans, respectively, for the construction of the dam. These are printed in Appendix C, infra, pp. 26-29.

Statement

These actions were brought for money damages, to abate a nuisance and for injunctive relief, the prayers for abatement and injunctive relief having been based upon maintenance of the dam. The two latter aspects of the actions are now academic. Since the commencement of the actions the dam has been removed. The jurisdiction of the District Court was invoked because the cause of action in each case is a civil action in which the matter in controversy exceeds $3,000.00, exclusive of interest and costs, and arises under The Constitution, Laws and Treaties of the United States, and is between a citizen of a State and a foreign state, which has waived immunity from suit and consented to be sued.

In each case process was served by delivering to and leaving with The Consul General of Canada, at his office in New York, a copy of the summons and complaint. In each case the Canadian Ambassador, *amicus curiae,* by leave of court, appeared as such by Sullivan and Cromwell, Esqs., his attorneys, and filed written suggestion that the District Court lacked jurisdiction over the person of the defendant because (1) there had been no sufficient service of process and (2) defendant as a friendly foreign

sovereign was immune from suit and had not waived such immunity.

Before this, and before the commencement of any of the actions now here, a like action had been instituted in the District Court by one Oster. In that action the Canadian Ambassador made request to the Secretary of State that he take action to terminate the proceedings on the basis of Canada's sovereign immunity. The request was refused on the ground that Canada had waived its sovereign immunity by building the dam. The exchange of correspondence is filed with the Clerk of the District Court by action of the Legal Advisor to the Department of State (Brief of Amicus Curiae, pp. 3-4, extract printed in Appendix D, infra, p. 30).

Subsequent to the filing of the written representations, the District Judge (Brennan, J.), gave notice to all parties of hearing to be held to inquire into the Court's jurisdiction. Hearing was had on October 10, 1955, and the District Judge handed down his opinion and decision on May 24, 1956, dismissing all the actions (R. 14a-23a). The District Judge prescinded from the question of waiver of immunity and based the dismissal of the actions upon the express ground that the service of process upon The Consul General of Canada was ineffective to obtain jurisdiction over the person of the defendant.

Appeal was taken in these cases to the United States Court of Appeals for the Second Circuit and on hearing of the appeal, the judgment of the court below was affirmed in open court, "per curiam", without opinion (R. 38a; pp. 22-25).

Reasons for Granting the Writ

The courts below have interpreted an express essential provision of an agreement between the governments of the United States and Canada in such a way as to elide the

provision from the agreement. In so doing, they have effectively barred a substantial group of citizens of the United States from valuable remedies the agreement explicitly was designed to ensure. The questions involved are important and have not been, but should be, settled by this Court.

The waiver by the defendant, Canada, of its immunity to suit and its consent to be sued in these actions is implicit in its acceptance of the condition that it pay citizens of the United States whose property may be injured by construction or operation of the dam such amount of compensation:

> "• • • as may be awarded the said parties in the proper court of the United States before which claims for damages may be brought." (pp. 27, 29)

The State Department has so ruled (supra; p. 30), and indeed, any other construction makes the provision meaningless.

In the circumstances, the courts below are believed to have erred in holding that service of process upon The Consul General of Canada, was ineffective to obtain jurisdiction over the person of the defendant (R. 21a, 22a). The holding is based upon rigid adherence to the premise that:

> "No authority exists for the service of process in a manner other than that set forth in the Federal Rules of Civil Procedure • • •." (R. 21a, p. 17)

That premise does not hold where the defendant has agreed in advance to accept some other form of service as sufficient. *Wilson* v. *Seligman*, 144 U. S. 41, 44.

The consent by the defendant, Canada, to be sued in these actions carries with it by necessary implication a consent that service of process be made upon it. Taking this to be so, the consent that service be made must be a

consent that the service be made in the one way found to be possible, namely, by delivery of process to The Consul General of Canada in New York.

A different conclusion means that the governments of the United States and Canada contracted for rights of redress for a class of citizens of the United States, and in the very act, denied them all means of availing themselves of those rights.

These actions involve the interpretation and effect of an international agreement between the United States and Canada. They involve very substantial property rights of a number of citizens of the United States, which rights have been foreclosed by the decisions in the courts below believed to be erroneous. Apart from any element of contract or consent, the effect of service of process upon The Consul General of a sovereign foreign state is a question of wide-spread interest and general importance that has not been settled by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. GUZZETTA,
Counsel for Petitioners.

Dated: March 4, 1957.

APPENDIX A

Statutes

UNITED STATES STATUTES AT LARGE

Vol. 30 p. 1151

Fifty-Fifth Congress, Sess. III

Chapter 425 of the Laws of 1899

Sec. 9. "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead haven, harbor, canal navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, that such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: and provided further, that where plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure unless the modification of such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

Appendix A.

UNITED STATES STATUTES AT LARGE
Vol. 32, p. 392
57th Sess. Congress
Chapter 1123 of the Laws of 1902

"An act allowing the construction of a dam across the Saint Lawrence River"

Whereas it is represented that the government of the Dominion of Canada, with a view of improving the navigation of the channel excavated through the rapids at the head of Les Galops Island in the Saint Lawrence River, proposes to construct a dam from Adams Island, in Canadian territory, to Les Galops Island in United States territory and

Whereas the consent of the United States to the construction of that part of the work which will be upon United States territory is desired:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that consent is hereby given for the construction of the portion of the aforesaid dam which crosses or abuts upon the territory of the United States: Provided, that the type of the proposed dam and the plans of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen thereof: and provided further that the work of construction on United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War.

Approved, June 18, 1902.

Appendix A.

Rule 4(d)

Rule 4(d) provides in relevant part as follows:

"The summons and complaint shall be served together . . . . Service shall be made as follows:

Service shall be made as follows:

"(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

[106]

APPENDIX B

Memorandum-Decision by Brennan, D.J.

(Filed May 25, 1956.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

—o—

1. ARTHUR OSTER and DOROTHY OSTER,
Plaintiffs,

vs.

DOMINION OF CANADA,
Defendant.

Civil No. 4511.

—o—

Appearances:
Perry Rauch, Esq.,
Attorney for Plaintiffs,
1104 State Tower Building,
Syracuse, N. Y.

No Appearance For Defendant.

—o—

2. WILLIAM L. CLAY, *et al.*,
Plaintiffs,

vs.

DOMINION OF CANADA,
Defendant.

Civil No. 4599.

—o—

Appearances:
William L. Clay, Esq.,
Attorney for Plaintiffs,
510 Powers Building,
Rochester 14, N. Y.

No Appearance For Defendant.

Appendix B.

—o—

3. WILLIAM L. CLAY, JR.,
Plaintiff,

vs.

DOMINION OF CANADA,
Defendant.

Civil No. 4600.

—o—

Appearances:

William L. Clay, Esq.,
Attorney in Person,
510 Powers Building,
Rochester 14, N. Y.

No Appearance For Defendant.

—o—

4. ONTARIO REFECTORIES INC.,
Plaintiff,

vs.

DOMINION OF CANADA,
Defendant.

Civil No. 4782.

—o—

Appearances:

Homer H. Marks, Esq.,
Attorney for Plaintiff,
16 State Street,
Rochester 14, N. Y.

Philip Hillsburg, Esq.,
Of Counsel,
State Tower Building,
Syracuse, N. Y.

No Appearance For Defendant.

Appendix B.

—o—

[107] 5. LEWIS DOLLINGER and LELIA A. DOLLINGER,
Plaintiffs,

vs.

HER MAJESTY ELIZABETH QUEEN OF CANADA and CANADA,
Defendant.

Civil No. 5011.

—o—

Appearances:

William L. Clay, Esq.,
Attorney for Plaintiffs,
510 Powers Building,
Rochester 14, N. Y.

Perry Rauch, Esq.,
Of Counsel,
1104 State Tower Building,
Syracuse, N. Y.

No Appearance For Defendant.

—o—

6. ARTHUR SHAUGHNESSY and ANNE SHAUGHNESSY,
Plaintiffs,

vs.

HER MAJESTY ELIZABETH QUEEN OF CANADA and CANADA,
Defendant.

Civil No. 5018.

—o—

Appearances:

William L. Clay, Esq.,
Attorney for Plaintiffs,
510 Powers Building,
Rochester 14, N. Y.

Perry Rauch, Esq.,
Of Counsel,
1104 State Tower Building,
Syracuse, N. Y.

No Appearance For Defendant

Appendix B.

7. ANGELO R. SANTORA,
Plaintiff,

vs.

HER MAJESTY ELIZABETH as of right Queen of Canada and Canada,
Defendant.

Civil No. 5086.

Appearances:

William L. Clay, Esq.,
Attorney for Plaintiff,
510 Powers Building,
Rochester 14, N. Y.

No Appearance For Defendant.

8. NORMAN ATTERBY and MARY ATTERBY, individually and NORMAN ATTERBY as President *et al.*,
Plaintiffs,

vs.

HER MAJESTY ELIZABETH II, QUEEN OF CANADA and the DOMINION OF CANADA,
Defendant.

Civil No. 5704.

Appearances:

Perry Rauch, Esq.,
Attorney for Plaintiffs,
1104 State Tower Building,
Syracuse, N. Y.

No Appearance For Defendant.

Appendix B.

[108] As *Amicus Curiae* upon the argument in support of the Suggestion of no jurisdiction.

Sullivan & Cromwell,
Attorneys at Law,
48 Wall Street,
New York 5, N. Y.

Inzer B. Wyatt, Esq.,
Of Counsel.

and

Courtney Kingstone, Esq.,
Legal Department of External Affairs,
Ottawa, Canada. (On Brief.)

INQUIRY INTO THIS COURT'S JURISDICTION

Considered Oct. 10, 1955; Last brief received Dec. 22, 1955; Decided May 24, 1956.

BRENNAN, Judge.

The problem involved in each of the above actions is one of jurisdiction. The question is similar in each case and this decision will apply in each of the above entitled actions.

Practically, Canada is the defendant in each of the claims. It is suggested that the correct denomination of the defendant is "Her Majesty Queen Elizabeth II in Right of Canada, the Sovereign of Canada". No point is made however of any error in the titles as they appear.

As far as important here, the actions seek the recovery of money damages to property claimed to have been caused by the elevation of the water level of Lake Ontario. The damages demanded are large in amount and represent the claims of many United States citizens. Action, Civil 5704, purports to be a class action in that it attempts to recover damages for persons who are similarly

situated. The factual background of the claims will be briefly referred to.

[109] The international boundary line between the United States and Canada, near the City of Ogdensburg N. Y., passes between Adams Island, which is in Canadian territory, and Les Galops Island, which is within the United States. Due to difficulties in navigation on the St. Lawrence River, negotiations were had between the United States and Canada whereby Canada constructed a dam known as the Gut Dam between the two islands with the apparent purpose of facilitating the passage of down-going vessels in the channel to the north of Adams Island. It was proposed that Canada build the dam which would, to some extent, be located upon United States territory. Negotiations were carried on between the two nations on a diplomatic level. Congressional approval to the erection of the dam was given. Plans therefor were approved in accordance with the statute, subject however to the condition below—

> "2. That if the construction and operation of the said dam shall cause damage or detriment to the property owners of Les Galops Island, or to the property of any other citizens of the United States, the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damage may be brought."

Formal assurance of the acceptance of the condition was made by the Canada authorities to the government of the United States or to the Secretary of War. The dam was thereafter constructed about 1903 and continued performing its functions until 1952 or 1953 when it was removed.

Appendix B.

Jurisdiction in each action is based upon Title 28 USCA Sec. 1331 and 1332 (a) (2) which sections refer to actions arising under the laws of the United States and actions based upon diversity of citizenship. In each of [110] the actions a suggestion that this Court had no jurisdiction has been filed by the Ambassador of Canada to the United States.

It appears that the claims of United States citizens, including those of the plaintiffs in these particular actions, have been the subject of discussion and conferences between the diplomatic representatives of the United States and Canada. In fact, the matter of the disposition of these and similar claims is still under consideration. This Court has delayed acting upon the "suggestion", above referred to, pending the outcome of such negotiations. It now appears however that the pendency of these actions may have tended to delay the progress of the negotiations and it is deemed advisable to decide the question raised.

The filing of the suggestions by the Ambassador, as above mentioned, has statutory authority in the Federal Rules of Civil Procedure 12 (h). Their function is to bring the question of jurisdiction to the attention of the Court (Rank v. U. S., 16 F. R. D. 310) and it is apparent that the Court should proceed no further in the cases until the question of jurisdiction is considered and decided. The burden of the suggestions filed in these cases is to the effect that the defendant is a sovereign and is immune from suit in this Court, such immunity not having been waived. It is also asserted in the suggestions filed that the service of process in these cases is insufficient to obtain jurisdiction over the person of the defendant.

Upon the invitation of the Court, all interested parties were invited to present their views as to the jurisdiction of the Court at a hearing. Such a hearing was held, argu-

ments were advanced and briefs were filed. Same have been considered; all of the pleadings and proceedings on [111] file in the Clerk's office have been examined and it is concluded that there is a lack of jurisdiction and the actions should be dismissed.

These are *in personam* actions and the presence of the defendant is an essential element of the jurisdiction of this Court. (Employers Corp. vs. Bryant, 299 U. S. 374 at 381 and 382). If there is a failure of jurisdiction, it arises either from insufficient service of process or the defendant's immunity from suit.

Service upon the defendant in each of these actions was made by the delivery of a copy of the summons and complaint to the Consul General of Canada or someone connected with his office at New York City. It is apparent from the whole record that the sufficiency of such service was disputed at the time. The question is referred to but not decided in the case of Puente v. Spanish Nat. State, 116 F. 2d 43.

No authority exists for the service of process in a manner other than that set forth in the Federal Rules of Civil Procedure (Clark County v. City of Los Angeles, 92 F. Supp. 28). Concededly there is no precedent which recognizes as valid the type of service of process made here. The argument that these actions came to the attention of the Canadian authorities and thereby performed their notice-giving function as referred to in Hickman v. Taylor, 329 U. S. 495 is unavailing since the above decision refers to the function of pleadings rather than to the function of process.

The limitations upon the authority of a consul is discussed in The Anne, 3 Wheaton U. S. 434 at 446. In fact a photostat copy of the appointment of the consul upon whom

service was made in these cases is found among the papers in the Oster action and his power is limited by the terms thereof to the protection of the interests of Canadian [112] citizens within his consular district. He is in no sense a managing agent.

It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the over all jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance (*Ex parte* Peru, 318 U. S. 578 at 587). Here the defendant has not appeared in any manner in these actions and a consideration of the effect of a holding that service upon a consul is service upon a sovereign is sufficient to conclude that the service of process here is ineffective to obtain jurisdiction over the person of the defendant.

Having arrived at the above conclusion, it would seem unnecessary to discuss and decide whether or not the immunity, ordinarily granted to a friendly sovereign, is available to the defendant in these cases. The determination of that question is not essential to this decision and it is evident that same requires both research and consideration. The United States seems to have lately adopted a more restrictive theory of immunity to a foreign country or sovereign. (See discussion in Republic of China v. National City Bank, 208 F. 2d 627 and in same case 348 U. S. 356). It is apparent from the file in the Oster case that there is a difference of opinion between the Canadian authorities and our Secretary of State's office as to the existence of the defendant's immunity in these cases. Whether or not the position of the United States will be followed by the courts is problematical although there seems to be a tendency in the reported cases to allow or disallow a plea of immunity in accordance with the action of the Executive Department.

Appendix B.

[113] The decision here rests upon the lack of jurisdiction over the person of the defendant. Such defect is sufficient authority for the dismissal of these cases. This has been the holding of judicial precedents since Herndon v. Rigdway, 58 U. S. 424. Since there appears to be no chance of the curing of the defect, referred to above, by a proper service of process upon the defendant, each of the above actions will be and is dismissed and it is

SO ORDERED.

STEPHEN W. BRENNAN,
United States District Judge.

Appendix B.

Memorandum Decision by United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 139-142—October Term, 1956.

(Argued December 7, 1956 Decided December 7, 1956.)

Docket No. 24208-11

—o—

WILLIAM L. CLAY, *et al.*,

Plaintiffs-Appellants,

—v.—

DOMINION OF CANADA,

Defendant.

—o—

WILLIAM L. CLAY, JR.,

Plaintiff-Appellant,

—v.—

DOMINION OF CANADA,

Defendant.

—o—

ANGELO R. SANTORA,

Plaintiff-Appellant,

—v.—

HER MAJESTY, ELIZABETH, as of right QUEEN OF CANADA, and CANADA,

Defendants.

—o—

Appendix B.

—o—

ARTHUR SHAUGHNESSY and ANNE SHAUGHNESSY,

Plaintiffs-Appellants,

—v.—

HER MAJESTY, ELIZABETH, QUEEN OF CANADA, and CANADA,

Defendants.

—o—

Before:

CLARK, *Chief Judge,* and
FRANK and LUMBARD, *Circuit Judges.*

Appeals from the United States District Court for the Northern District of New York, Stephen W. Brennan, *Judge.*

—o—

JOHN W. GUZZETTA, Mount Vernon, New York (William L. Clay, Rochester, New York, on the brief), *for plaintiffs-appellants.*

INZER B. WYATT, New York City (Sullivan & Cromwell, New York City, on the brief), *for Arnold D. P. Heeney, Ambassador of Canada to the United States, as amicus curiae.*

—o—

PER CURIAM:

Judgments affirmed in open court.

Appendix B.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of December, one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK, *Chief Judge*
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

—o—

WILLIAM L. CLAY, *et al.*,

Plaintiffs-Appellants,

v.

DOMINION OF CANADA,

Defendant-Appellee.

—o—

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix B.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of December one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK, *Chief Judge*
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

—o—

WILLIAM CLAY, JR.,
Plaintiff-Appellant,

v.

DOMINION OF CANADA,
Defendant-Appellee.

—o—

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

Appendix B.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of December one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK, *Chief Judge*
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

—o—

ARTHUR & ANNE SHAUGHNESSY,
Plaintiffs-Appellants,

v.

HER MAJESTY, ELIZABETH, QUEEN OF CANADA, AND CANADA,
Defendant-Appellee.

—o—

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix B.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of December one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK, *Chief Judge*
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

—o—

ANGELO R. SANTORA,
Plaintiff-Appellant,

v.

HER MAJESTY, ELIZABETH AS THE RIGHT QUEEN OF CANADA, AND CANADA,
Defendant-Appellee.

—o—

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

(R. 93)

U. S. ENGINEER OFFICE
Buffalo, N. Y.
Received Aug 22, 1903

Copy of 37266/74

WHEREAS, It is represented that the government of the Dominion of Canada, with a view to improving the navigation of the channel excavated through the rapids at the head of LES GALOPS ISLAND in the SAINT LAWRENCE RIVER, proposes to construct a dam from Adams Island, in Canadian territory, to Les Galops Island, in United States territory;

AND WHEREAS, By an act of Congress, approved June 18, 1902, entitled "An Act allowing the construction of a dam across the Saint Lawrence River (32 Stat. L. 392), it is provided:

> "That consent is hereby given for the construction of the portion of the aforesaid dam, which crosses or abuts upon the territory of the United States; *Provided,* That the type of the proposed dam and the plans of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War materially affect the water level of Lake Ontario or the St. Lawrence River or cause any other injury to the interests of the United States or any citizen thereof. *And provided* further, That the work of construction on United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War;"

AND WHEREAS, the Canadian authorities have submitted to the Secretary of War, for his examination and ap-

proval, plans and details for the construction of said dam upon the territory of the United States, and, in the judgment of the Secretary of War, the type of the proposed dam and the plans of construction and operation thereof are such as will not materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen thereof;

Now, Therefore, This is to certify that, in accordance with the recommendation of the Chief of Engineers, the Secretary of War hereby approves the plans of said dam, which said plans are hereto attached, subject to the following conditions:
(R. 94)

1. That, if, after the said dam has been constructed, it is found that it materially affects the water levels of Lake Ontario or the Saint Lawrence River or causes any injury to the interest of the United States, the Government of Canada shall make such changes therein, and provide such additional regulation works in connection therewith, as the Secretary of War may order.

2. That if the construction and operation of the said dam shall cause damage or detriment to the property owners of Les Galops Island, or to the property of any other citizens of the United States the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties *in the proper court of the United States before which claims for damage may be brought.*

Witness my hand this 18th day of August, 1903.

Elihu Root,
Sec'y of War

Appendix C.

(R. 101)

U. S. Engineer Office
Buffalo, N. Y.

Received Oct. 19, 1904

J. A. G. O.
(9510)

Whereas, By an instrument, dated August 18, 1903, the Secretary of War, under authority of an Act of Congress, approved June 18, 1902, entitled "An Act allowing the construction of a dam across the Saint Lawrence River" (32 Stats. L. 392) approved plans and details for the construction by the Canadian authorities on United States territory of a proposed dam from Adams Island, in Canadian territory, to Les Galops Island, in United States territory, upon certain conditions therein specified;

And Whereas, Application is now made by the Department of Railways and Canals of Canada for approval by the Secretary of War of modified plans providing for raising the crest of the dam two and one-half feet higher than shown on the plans originally approved, as indicated in red on said modified plans;

And Whereas, Upon investigation by the Engineer Department, U. S. Army, the Secretary of War is of opinion that the type of the proposed dam and the plans of construction and operation thereof, as provided for in the modified plans, are such as will not materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen thereof;

Appendix C.

NOW, THEREFORE, This is to certify that, in accordance with the recommendation of the Chief Engineers, U. S. Army, the Secretary of War hereby approves said modified plans, which are hereto attached, subject to the following conditions, viz.

(R. 101)

"1. That if, after said dam has been constructed, it is found that it materially affects the water levels of Lake Ontario or the Saint Lawrence River or causes any injury to the interest of the United States, the government of Canada shall make such changes therein, and provide such additional regulation works in connection therewith, as the Secretary of War may order.

2. That if the construction and operation of the said dam shall cause damage or detriment to the property owners of Les Galops Island, or to the property of any other citizens of the United States, the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damages may be brought."

WITNESS my hand this tenth day of October, 1904.

ROBERT SHAW OLIVER,
Acting Secretary of War

(SEAL)

37266 C.E.

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APPENDIX D

(Pages 3-4 from Brief of Amicus Curiae)

The Canadian Ambassador in November 1952 wrote to The Secretary of State requesting that he take action on the basis of Canada's sovereign immunity to terminate the proceedings in the first action commenced in the Northern District; this first action was the only action then pending. Shortly thereafter, Jack B. Tate, Esq., for the Secretary of State, replied to the Canadian Ambassador declining to take the action requested and expressing the opinion that Canada had waived its sovereign immunity at the time the dam was erected in 1903 and 1904. In December, 1952, the Legal Adviser to the Department of State caused the foregoing exchange of correspondence to be filed with the Clerk of the District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 821

WILLIAM L. CLAY, et al.,
Petitioners,

vs.

DOMINION OF CANADA,
Respondent.

WILLIAM L. CLAY, JR.,
Petitioners,

vs.

DOMINION OF CANADA,
Respondent.

ANGELO R. SANTORA,
Petitioners,

vs.

HER MAJESTY ELIZABETH as of right Queen of Canada, and Canada,
Respondents.

ARTHUR SHAUGHNESSY and ANNE SHAUGHNESSY,
Petitioners,

vs.

HER MAJESTY ELIZABETH QUEEN OF CANADA and CANADA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR ARNOLD D. P. HEENEY, AMBASSADOR OF CANADA TO THE UNITED STATES, AS *AMICUS CURIAE* IN OPPOSITION

Opinions Below.

The opinion of the District Court (R. 14a-23a) is reported at 144 F. Supp. 746. The affirmance, without opin-

ion, of the Circuit Court of Appeals (R. 37a-38a; App. B of Petition) is reported at 238 F. 2d 400.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on December 7, 1956 (R. 39a-46a; App. B of Petition, pp. 22-25). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

Question Presented.

Was jurisdiction acquired by the District Court over the person of Her Majesty Queen Elizabeth II in Right of Canada by service of process on the Canadian Consul General in New York?

Statute Involved.

Rule 4(d) of the Rules of Civil Procedure for the United States District Courts provides in relevant part:

> "The summons and complaint shall be served together. . . . Service shall be made as follows:
>
> "(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

Statement.

These actions, *in personam*, were brought for money damages and, in addition, abatement of a nuisance and a mandatory injunction. The nuisance and injunction aspects are moot because the alleged nuisance, a dam, has been removed since the actions were attempted to be commenced.

The defendant in each of the actions is Canada, a friendly foreign nation which is a constitutional monarchy; the reigning monarch is Queen Elizabeth II in Right of Canada (appendix hereto, p. 5a). The name by which the defendant is designated in the several actions varies; but concededly, the defendant is the Canadian sovereign.

These actions, and four additional similar actions which others attempted to commence in the same District Court, are all based on substantially the following averments. In 1903 and 1904, Canada erected a small dam ("Gut Dam") between two islands in the St. Lawrence River, one of which was territory of the United States. Congress authorized construction of the dam on territory of the United States (App. A of Petition, p. 8). It is asserted that in connection therewith Canada undertook to pay for any damage caused by the dam. It is claimed that, some forty years after its erection, the dam caused a rise in the water level of Lake Ontario and damage to plaintiffs from flooding. The dam was removed in January 1953.

It was attempted in each action to serve the summons and complaint on the defendant by leaving copies with the Consul General of Canada in the City of New York at his office.

The Canadian Ambassador in November 1952 wrote to the Secretary of State requesting that he take action on the basis of Canada's sovereign immunity to terminate the proceedings in *Oster* v. *Dominion of Canada*, the first of the similar actions commenced in the Northern District; this first action was the only action then pending.

Shortly thereafter, Jack B. Tate, Esq., for the Secretary of State, replied to the Canadian Ambassador declining to take the action requested and expressing the opinion that Canada had waived its sovereign immunity at the time the dam was erected in 1903 and 1904. In December 1952, the Legal Adviser to the Department of State caused the foregoing exchange of correspondence to be filed with the Clerk

of the District Court but no other action has been taken by the Department of State with respect to these suits. The letter of Mr. Tate has been printed as part of the appendix hereto (pp. 14a, 15a) at the request of counsel for petitioner.

In each action, a written suggestion was filed with the District Court by the Canadian Ambassador. This document (substantially the same in all of the actions here) suggested that the Court lacked jurisdiction over the person of defendant because (1) there had been no sufficient service of process and (2) defendant as a friendly foreign sovereign was immune from suit and had not waived such immunity.

One of the suggestions (in *Santora*) is printed in the appendix hereto (pp. 1a-2a).

On October 10, 1955, District Judge STEPHEN W. BRENNAN, after giving notice to all interested parties, held a hearing to inquire into the Court's jurisdiction in all of the similar pending cases. No objection was made by anyone to the procedure adopted by the District Court. The Canadian Ambassador was permitted, through counsel, to present oral argument and to file an affidavit and brief as *amicus curiae* in support of the suggestions that there was no jurisdiction.

The affidavit and accompanying papers filed in support of the suggestions pointed out that Canada was a constitutional monarchy and that the reigning sovereign was Her Majesty Queen Elizabeth II in Right of Canada (appendix hereto, p. 5a). It was specifically denied that any sovereign immunity had been waived (appendix hereto, p. 6a). It was denied that the Consul General in New York had any authority to accept process on behalf of Her Majesty (appendix hereto, p. 10a). The text of the Commission of the Consul General, setting forth the limits of his authority, was submitted (appendix hereto, pp. 12a-13a).

After the hearing before Judge BRENNAN, a brief was submitted on behalf of some of the plaintiffs contending

that the District Court had jurisdiction over the person of defendant.

On May 24, 1956, the District Judge handed down his opinion and decision, dismissing all the actions (144 F. Supp. 746).

These four actions were appealed to the Court of Appeals for the Second Circuit. The four other similar cases were not appealed.

On November 5, 1956, the Circuit Court of Appeals granted from the Bench a motion by Arnold D. P. Heeney, Ambassador of Canada to the United States, for leave to file a brief *amicus curiae* and to present oral argument.

On hearing of the appeals, the Court of Appeals in open court affirmed the judgments of the District Court, *per curiam*, without opinion (238 F. 2d 400; R. 37a-38a; App. B of Petition, pp. 20-21).

In these four actions, petitions for certiorari to review the judgments of the Court of Appeals were filed.

The petitioners consented to the filing on behalf of Arnold D. P. Heeney, Ambassador of Canada to the United States, of a brief and appendix as *amicus curiae* in opposition to the petitions for certiorari. This brief and appendix for the Ambassador is filed pursuant thereto.

Argument.

The petitioner, as a reason for the granting of the writ, has stated (Petition, p. 6) that the question presented here has general importance. This conclusion is certainly erroneous.

The question here has limited significance for obviously it can arise only in an unusual circumstance, i.e., where it is attempted to gain *in personam* jurisdiction over an unwilling foreign sovereign alleged to have waived sovereign immunity prior to service. The number of actions involving sovereign foreign nations, willing or unwilling, are few indeed.

This Court has stated on a number of occasions that *in personam* jurisdiction can be obtained only by proper service of process on a party or by the party's voluntary appearance or participation in the proceedings.

> "This case presents no question of the jurisdiction of the district court over the *person* of a defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation."
>
> *Ex Parte Peru*, 318 U. S. 578, 587 (1943; italics ours).

In the actions here, there was no voluntary appearance or participation in the proceedings by the defendant; thus, only by proper service of process could the District Court obtain jurisdiction over the defendant. Service of process in the Federal Courts is governed by Rule 4(d), *supra*, p. 2.

The lower Federal Courts have uniformly held:

> "Jurisdiction of the person of a defendant in the federal court may be obtained only by compliance with Rule 4(d), Federal Rules of Civil Procedure."
>
> • • •
>
> "In the federal courts service of summons may be made in no manner other than that set forth in the Federal Rules of Civil Procedure and in such Rules we find no provision whereby a municipal corporation may be brought within the jurisdiction of a federal court sitting in a state other than the state of which the municipal corporation is a creature."
>
> *Clark County, Nevada* v. *City of Los Angeles*, 92 F. Supp. 28, 32 (D. Nev. 1950).

Other recent cases have reached the same conclusion. *O'Toole* v. *United States*, 106 F. Supp. 804 (D. Del. 1952) (which quoted the above excerpts from *Clark County, Nevada* v. *City of Los Angeles, supra*, with approval), aff'd in part and rev'd in part, 206 F. 2d 912 (3d Cir. 1953);

Zuckerman v. *McCulley*, 7 F. R. D. 739 (E. D. Mo. E. D. 1947), appeal dismissed 170 F. 2d 1015 (8th Cir. 1948); *Queens County Group of Savings and Loan Ass'ns* v. *Home Loan Bank Board*, 104 F. Supp. 396 (E. D. N. Y. 1952).

In these actions there was, under set principles of law, failure to comply with the requirements of Rule 4(d)(1) for the defendant was not served personally; nor was there service on any "agent authorized by appointment or by law to receive service of process".

Manifestly, the commission of the Canadian Consul who was served (appendix hereto, pp. 12a-13a), did not authorize him to accept service of process as an agent. His functions were expressly limited and his only authority was

> "to aid and protect those *Canadian* citizens who may trade with or visit or reside within his Consular District" (italics ours).

This description of the Canadian Consul's limited authority is consistent with the view of consular functions universally accepted for many years; it is entirely clear that he is not an "agent authorized . . . by law to receive service of process."

This Court many years ago described a consul's authority and functions as limited to acts in relation to the citizens *of his own country* rather than in relation to the citizens of the country to which he is sent. The consul does not in any sense represent his government vis-a-vis the citizens or government of the country to which he is sent.

> "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to rep-

resent him in his negotiations with foreign states, or to vindicate his prerogatives."

The Anne, 3 Wheat. 435, 445-446 (STORY, J., 1818).

The Pan-American Consular Convention of February 20, 1928 (47 Stat. 1976), which governs the consular practice of the United States and of twenty other American nations (but not including Canada) describes the authority of consuls as follows:

"States may appoint in the territory of others, with the express or tacit consent of the latter, consuls who shall there represent and defend their commercial and industrial interests and render to their nationals such assistance and protection as they may need."

The Department of State of the United States has recognized that service of process may not properly be made on a consul. This is evidenced by a letter which was addressed to the Governor of New York in regard to an action which a group of bankers attempted to commence in the state court of New York against Mexico. The State Department there said (italics ours):

"It hardly seems necessary to point out that a foreign government may not be sued in the United States in the absence of an applicable treaty without the expressed consent of that government. It is assumed from the Ambassador's note of April 16, 1931, that the Mexican Government does not consent to be sued in the present case. *Moreover, it seems to be well established that neither the Ambassador nor the Consular Officer of the country concerned has any authority to accept service on behalf of their Government.*"

Foreign Relations of the United States, 1931, Vol. 2, p. 730; 2 Hackworth, Digest of International Law, pp. 394-395.

The action was subsequently dismissed as against Mexico.

Gallopin v. *Winsor*, 234 App. Div. 601 (1st Dept. 1931).

It may be true that this Court has not specifically passed on the validity of service of process on a consul to bind a foreign nation and confer *in personam* jurisdiction over such nation. However, the palpable lack of merit of any claim to *in personam* jurisdiction over a friendly foreign sovereign by service on a consul, the past uniformity of the decisions of the lower courts, and the accepted diplomatic procedure would appear to make it unnecessary for this Court to do so now. The law is clear and settled.

The petitioners imply (Petition, p. 5) that Canada had agreed in advance to accept some form of service other than that specified in Rule 4(d) and they state that in such an instance the procedure set forth in Rule 4(d) is not restrictive.

Wilson v. *Seligman*, 144 U. S. 41 (1891)

is cited as authority for this conclusion.

The petitioners do not cite any such agreement by Canada; there is none in the record.

It is also submitted that *Wilson* v. *Seligman* is, in this instance, not relevant. It was decided long before the Federal Rules of Civil Procedure were adopted in 1938. Also, it was concerned with the question of the validity of a *Missouri statute* which required as a condition precedent of a corporation transacting business or incorporating within the state that it and its stockholders appoint an agent or designate a domicile where service for certain purposes might be made within the state, and upon failure of either to do so, service might be made on a certain public officer. Consent of both to such service was implied from the corporation doing business in the state and the public officer

to accept service was designated in the statute. On its face, the case is obviously not pertinent here.

Admittedly, the Federal Rules of Civil Procedure provide no means by which service may be made upon an unwilling sovereign. It is submitted that such an omission was intentional on the part of those who drafted the Rules. Probably aware of the settled law that no *antecedent* waiver of sovereign immunity was considered effective by the courts, e.g.,

> *Kahan* v. *Federation of Pakistan* (1951) 2. K. B. 1003;
>
> *Duff Development Co.* v. *Government of Kelantan* (1924) A. C. 797;
>
> *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. 149 (C. A.),

they did not contemplate that any action against a foreign sovereign would ever be entertained except where the foreign sovereign voluntarily appeared in the very action itself thereby obviating the necessity of service of process. In view of the past judicial determinations and diplomatic procedure defining the limited authority of consuls, cited above, it is not believed necessary for this Court to articulate the conclusion that the failure to provide a means of service under the Federal Rules does not permit *in personam* jurisdiction over a foreign sovereign to be obtained by service of process on one of its consuls.

The decision below was eminently correct and in accord with prior decisions of both the Federal and State Courts. No conflict between decisions of Courts of Appeal on this question exists. Accepted diplomatic procedure is in accord. In addition, the question raised is of a uniquely narrow interest.

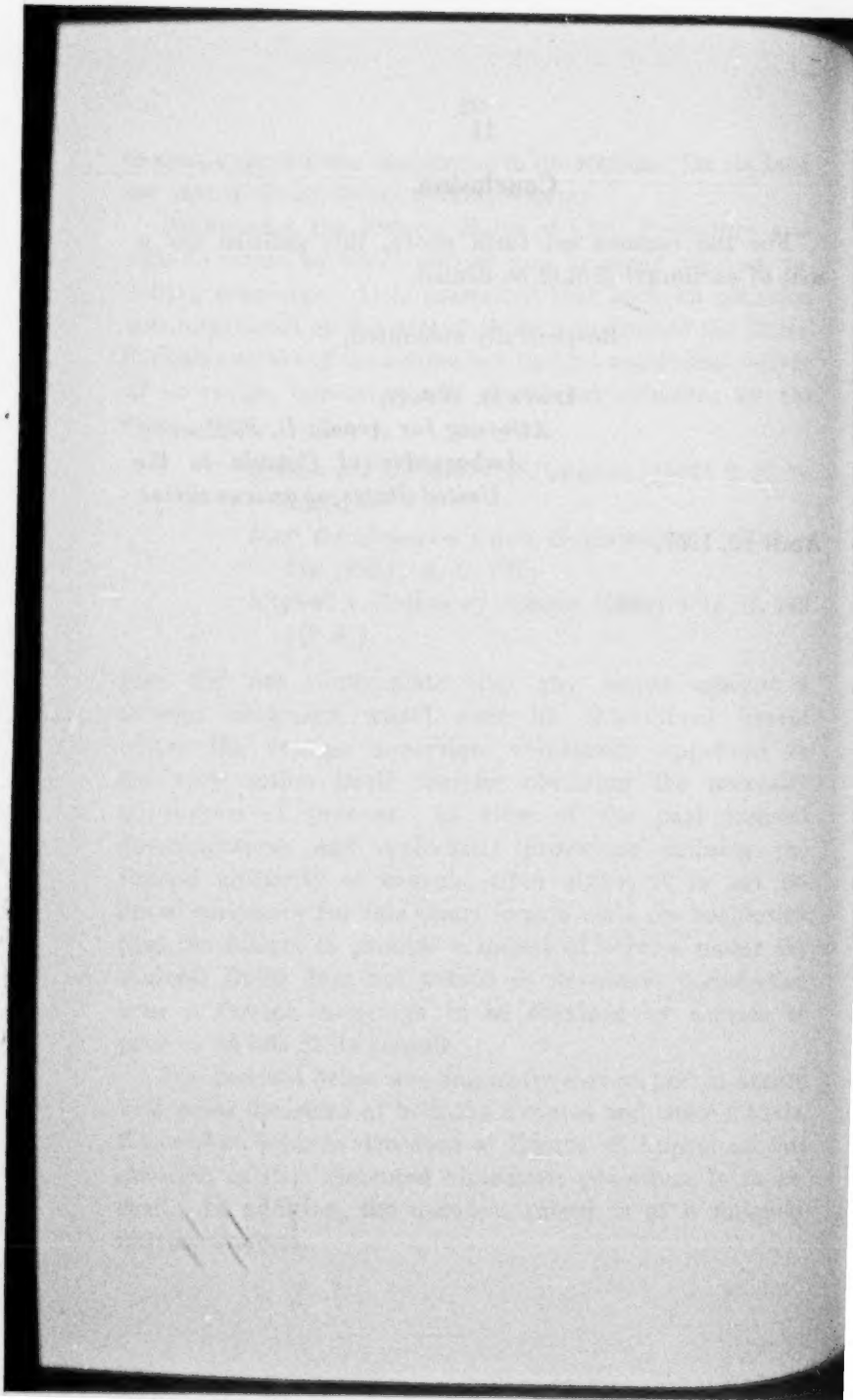
Conclusion.

For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

INZER B. WYATT,
Attorney for Arnold D. P. Heeney, Ambassador of Canada to the United States, as amicus curiae.

April 12, 1957.



APPENDIX TO BRIEF FOR ARNOLD D. P. HEENEY, AS *AMICUS CURIAE*

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Stipulation of Inzer B. Wyatt, Attorney for Mr. Heeney, and John W. Guzzetta, Attorney for the Petitioners, in which it was agreed that the appendix to Mr. Heeney's brief would include a copy of letter from Jack B. Tate, Esq., to Mr. Hume Wrong of November 17, 1952	16a

Suggestion, Dated January 11, 1954.

Washington, D. C.
January 11, 1954.

To the Honorable the Judges of the United States District Court for the Northern District of New York:

Information has been given me that on December 28, 1953, a United States Marshal called at the Canadian Consulate General in New York, and left on a desk in the Consulate General a copy of the summons and of the complaint in an action entitled in the United States District Court for the Northern District of New York, Civil Action No. 5086, Angelo R. Santora, Plaintiff against "Her Majesty Elizabeth as of right Queen of Canada and Canada", Defendant.

I have the honor to represent in the United States Her Majesty Queen Elizabeth II in right of Canada as Ambassador and I am instructed by Her Majesty's Government in Canada respectfully to address your Honors with reference to the action above described.

Her Majesty's Government in Canada have instructed me respectfully to suggest to your Honors that, as a sovereign and under well established principles of international law, Her Majesty in right of Canada is not subject to suit in your honorable Court without her consent, which consent has not been given and is not given in the action above described. There is the following averment in the complaint in the action: "The Defendants have waived any immunity from suit and have consented to be sued as hereinafter set forth." I am instructed that Her Majesty has not waived immunity from suit in your honorable Court and has not consented to be sued in your honorable Court, either as set forth in the complaint or otherwise. It should also be pointed out that a Canadian Consular officer in New York would not in any event be a person authorized to receive writs, notices or other forms of process on behalf of Her Majesty.

The purpose of this letter is solely to invite the attention of your Honors to a lack of jurisdiction in your honorable Court; it does not in any way constitute an appearance or a submission or a consent to jurisdiction. Her Majesty in right of Canada asserts and relies upon an immunity from suit as a sovereign and, in consequence, suggests that your honorable Court should proceed no further in the subject action.

Respectfully submitted,

A. D. P. Heeney
Ambassador of Canada to the United States.

Affidavit of Inzer B. Wyatt, Sworn to October 7, 1955.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

IN RE:	
1. OSTER et ano. v. DOMINION OF CANADA	Civil No. 4511
2. CLAY et al v. DOMINION OF CANADA	Civil No. 4599
3. CLAY, JR. v. DOMINION OF CANADA	Civil No. 4600
4. ONTARIO REFECTORIES INC. v. DOMINION OF CANADA	Civil No. 4782
5. DOLLINGER et ano. v. HER MAJESTY ELIZABETH, QUEEN OF CANADA and CANADA	Civil No. 5011
6. SHAUGHNESSY et ano. v. HER MAJESTY ELIZABETH, QUEEN OF CANADA and CANADA	Civil No. 5018
7. SANTORA v. HER MAJESTY ELIZABHTH as of right QUEEN OF CANADA and CANADA	Civil No. 5086
8. ATTERBY, individually etc. v. HER MAJESTY ELIZABETH II, QUEEN OF CANADA and CANADA	Civil No. 5704

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

INZER B. WYATT, being duly sworn, deposes and says:

I am an attorney at law, a member of the bar of this Court and a member of the firm of Sullivan & Cromwell,

attorneys, whose offices are at 48 Wall Street, New York 5, New York.

At the request of Honorable A. D. P. Heeney, Ambassador of Canada to the United States, I respectfully ask leave to present to this Honorable Court certain information which under settled principles of international law, should lead this Court to dismiss the complaints in these actions and to proceed no further in them. The information is contained in a letter to me from Mr. Heeney, dated October 6, 1955, original of which is annexed hereto with copies of the documents referred to therein.

In presenting the accompanying letter with its annexed material, I am acting solely as *amicus curiae*. Neither my firm nor I have authority to appear in these actions for Her Majesty Queen Elizabeth II in Right of Canada or otherwise to submit the Government of Canada to the jurisdiction of this Honorable Court.

INZER B. WYATT

Sworn to before me this
7th day of October, 1955.

BARBARA A. BEUCHLER
Notary Public, State of New York
No. 30-0281850, Qualified in Nassau Co.
Cert. filed in New York County
Commission Expires March 30, 1957

(Notarial Seal)

Letter of Arnold D. P. Heeney to Sullivan & Cromwell, Dated October 6, 1955.

SULLIVAN & CROMWELL, Esqs.,
48 Wall Street,
New York 5, N. Y.

October 6, 1955.

Attention: Inzer B. Wyatt, Esq.

Dear Sirs,

I take this opportunity to state the position of the Government of Canada with respect to the eight actions now pending in the United States District Court for the Northern District of New York, entitled *Arthur Oster, et al.* v. *Dominion of Canada,* Civil Action No. 4511; *William L. Clay, et al.* v. *Dominion of Canada,* Civil Action No. 4599; *William L. Clay, Jr.* v. *Dominion of Canada,* Civil Action No. 4600; *Ontario Refectories, Inc.* v. *Dominion of Canada,* Civil Action No. 4782; *Dollinger, et ano.* v. *Her Majesty, etc.,* Civil Action No. 5011; *Shaughnessy, et ano.* v. *Her Majesty, etc.,* Civil Action No. 5018; *Santora* v. *Her Majesty, etc.,* Civil Action, No. 5088; and *Atterby, individually etc.* v. *Her Majesty, etc.,* Civil Action No. 5704. It is claimed in those actions that the Government of Canada by reason of its construction in 1903 and 1904 of Gut Dam, caused a rise in the water level of Lake Ontario and thereby caused injury to property within the United States. The claims cannot relate to any damage allegedly being suffered at the present time or for several years past, for Gut Dam was removed in January of the year 1953.

Some of the actions referred to above improperly designate the defendant as "Dominion of Canada". As you know, Canada is a sovereign and independent state and, in its form of Government, is a constitutional monarchy. The reigning sovereign is Her Majesty Queen Elizabeth II in Right of Canada. Accordingly lawsuits directed against the Government of Canada should be brought in the name of the sovereign.

In letters to the Court in all these actions it has been suggested to the Court by the proper diplomatic representatives of Canada that, as a sovereign and under well established principles of international law, Her Majesty Queen Elizabeth II in Right of Canada is not subject to suit in the courts of the United States without her consent, which consent has not been given. Although the plaintiffs in the eight actions apparently contend that Her Majesty has waived her immunity from suit and has consented to be sued, the Court has been informed that Her Majesty has not waived her immunity from suit and has not consented to be sued in the United States District Court for the Northern District of New York either as set forth in the complaints or otherwise. It has accordingly been suggested that the Court proceed no further in those actions.

The Government of Canada has caused to be made a study of the archives and records concerning the dealings from 1900 to 1904 between Canada and the United States with respect to Gut Dam. Documents contemporaneous with the negotiations and discussions leading to the approval by the United States Government of the construction of Gut Dam demonstrate that the Canadian Government has never consented to be sued for the injuries allegedly suffered by the plaintiffs.

Late in 1900, the Canadian Minister of Railways and Canals initiated discussions with United States authorities about the desirability of consent by the United States to the construction of a dam between Adams Island in Canada and Les Galops Island in the United States. Canadian authorities at the time deemed construction of such a dam necessary to the interests of both countries as part of a program of improvement to navigation through the channel previously excavated in rapids of the St. Lawrence River between Adams Island and the Canadian shore. Because of the provisions of U. S. Public Law No. 189 of March 3, 1899, the consent of Congress was requested for the construction of such a dam, and such consent was given by Congress in U. S. Public Law No. 164 of June 18, 1902:

> "*Provided,* That the type of proposed dam and the plans of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War, materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen thereof: *And provided further,* That the work of construction on United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War."

Beginning in July, 1902, Canadian and United States authorities were in correspondence and discussion concerning approval of plans and details of Gut Dam, as required by the statute, by the United States Secretary of War. The matter was dealt with by the United States through Major Thomas W. Symons of the United States Army Corps of Engineers. A letter dated February 10, 1903, from Mr. L. K. Jones, Secretary of the Canadian Department of Railways and Canals, to Major Symons contains a reference to an interview which took place shortly before that date and in which Major Symons

> "suggested that in order to the facilitating of the questions arising in connection with the construction of the proposed dam between Adams Island and Les Galops Island by the Canadian Government, it would be advisable that assurance be obtained that compensation would be paid by the Canadian Government to such party or parties as might be resident on Les Galops Island, whose property might be affected by this work . . ."

A photostatic copy of the letter dated February 10, 1903 from Secretary Jones to Major Symons is annexed. It is significant that Major Symons expressed concern, not that there might be damage to privately owned property on the United States *mainland,* but that there might be property damage *on Les Galops Island.* The only United States

citizen owning property on Les Galops Island at the time was Mr. Alban Dawson and none of the plaintiffs in these actions complain of injury to property located there. Moreover, any claim for injury to property on Les Galops Island would be untenable in view of the arrangements described below which were made at the time by the Canadian Government.

On February 6, 1903, the Canadian Government expressly authorized the Minister of Railways and Canals, Honorable Andrew G. Blair, to give assurance to the United States that if any damage or detriment should be caused to *"the owner or occupant" of Les Galops Island*, "and should the Department of Railways and Canals be unable to arrive at any satisfactory settlement with the party or parties *owning the portion of the Island affected*, the Government of Canada will pay such amount of compensation for the damage that may be done, as may be awarded *the owner or occupant*, in the proper court of the United States before whom his claims may be brought" (emphasis mine). A copy of the relevant order of the Canadian Privy Council made on February 6, 1903 is annexed. Mr. Blair executed a formal assurance as authorized and the document was sent to Major Symons by Secretary Jones under cover of his letter of February 10, 1903. A photostatic copy of the assurance, also dated February 10, 1903, is annexed.

It is of interest to note that the recommendation made by the Minister to the Canadian Government referred only to the occupant of Les Galops Island:

> "As this Island (Les Galops) is occupied by a citizen of the United States, whom it would be only fit and proper to compensate in the event of any damage being caused by rise of water or otherwise . . ."

It will thus be seen from the annexed documents that the assurance of the Minister plainly did not run to the plaintiffs in these actions or to their predecessors in interest. The assurance of the Minister ran only to the owner or occupant of property on Les Galops Island.

Upon receiving assurance of compensation to the one private property owner on Les Galops Island, Major Symons wrote on February 12, 1903 to Secretary Jones that

> "This removes the only objections to the proposed dam, and I shall at once recommend that the necessary authority be given."

A photostatic copy of the letter of February 12, 1903 from Major Symons to Secretary Jones is annexed.

An instrument approving the construction of Gut Dam by the Government of Canada was subsequently issued by the United States Secretary of War, Mr. Elihu Root. A photostatic copy of the instrument of approval dated August 18, 1903 is annexed. Meanwhile, negotiations were under way between Canadian authorities and the heirs of Mr. Dawson (the owner of property on Les Galops Island) and a settlement was ultimately concluded. Upon the payment to them of $4,000.00, Mr. Dawson's heirs and next of kin executed a conveyance and a release of all claims whatsoever growing out of the construction of Gut Dam. A photostatic copy of the release executed by the Dawson heirs and next of kin is annexed.

In advising the British Ambassador of his issuance of an instrument of approval, Secretary Root wrote on August 18, 1903 that he had signed the instrument of approval that day

> "subject to certain conditions set forth in the instrument which are in accord with stipulations made by the representatives of the Dominion Government, Mr. L. K. Jones, Secretary, and Mr. Andrew G. Blair, Minister of Railways and Canals in Canada."

As previously mentioned, the stipulations referred to related only to the "owner or occupant" of Les Galops Island. It is obvious, therefore, that if the conditions of the instrument of approval were "in accord with" the Canadian stipulations, those conditions could not go further than the Canadian stipulations and must have referred *exclusively to damage caused to the owners of Les Galops Island.* A

photostatic copy of the letter of August 18, 1903 from Secretary Root to the British Ambassador is annexed.

Canadian authorities subsequently decided that the crest of Gut Dam should be raised two and one-half feet and a second instrument of approval was issued by the United States Acting Secretary of War on October 19, 1904. This approval was given after agreement had been reached by the engineers for both Governments that the raising of Gut Dam would have no material effect on water levels. A photostatic copy of the instrument of approval dated October 19, 1904 is annexed.

With respect to the attempted service of process in these actions upon the Canadian Consul General in New York, the position of the Government of Canada (a position based upon settled principles of international law) is that the Consul General is not and was not authorized to accept service of process on behalf of Her Majesty Queen Elizabeth II in right of Canada. The Consul General possesses no plenipotentiary powers and such authority as he does possess stems wholly from his commission, which empowers him only

> ". . . to aid and protect those Canadian citizens who may trade with or visit or reside within his Consular District. . . ."

Annexed is a photostatic copy of the commission of Kenneth Alfred Greene, former Consul General for Canada in New York, on whom service was attempted to be made in the first several of these actions. Annexed also is a typed transcript of the text of the commission. Whoever occupied the position of Consul General for Canada in New York at the time of attempted service in any of these cases acted under a commission similar to that of Mr. Greene. Although the Consul General may, in the course of giving aid and protection to Canadian citizens within his Consular District, make appropriate representations to local authorities, he has no authority whatever to accept process on behalf of Her Majesty Queen Elizabeth II in right of Canada.

You are authorized and requested to bring the information contained herein to the attention of the United States District Court for the Northern District of New York but you are not authorized to appear for Her Majesty Queen Elizabeth II in right of Canada or otherwise to submit Her Majesty to the jurisdiction of that court.

Despite all the factors referred to above, the Government of Canada has nevertheless attempted to be entirely fair and reasonable in its attitude toward the Gut Dam claims advanced by citizens of the United States. In this connection, the Government of Canada has for a long time been on record with the United States Department of State and with representatives of the claimants that Canada was entirely willing to have the claims investigated and decided by international arbitration. Indeed, negotiations to that end have for some time been conducted between the two countries and these negotiations, if successfully accomplished, will result in the setting up of an international arbitral tribunal to determine the claims.

Very truly yours,

A. D. P. Heeney,
Ambassador of Canada to the United States.

Text of the Commission of Kenneth Alfred Greene, Consul General of Canada in the United States of America, Dated December 8, 1949.

ALEXANDER OF TUNIS

SEAL
STUART A. GARSON
ATTORNEY GENERAL
CANADA

CANADA
GEORGE THE SIXTH,

By the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith.

To All and Singular to whom these Presents shall come,

GREETING:

Whereas we have thought it necessary for encouraging Canadian citizens trading to the United States of America to appoint a Consul General of Canada at New York in the United States of America, with jurisdiction in the States of Connecticut, Delaware, Florida, Georgia, Maryland, New Jersey, New York, North Carolina, South Carolina, Pennsylvania, Virginia and West Virginia, to take care of Canadian citizens and to aid and assist them in all their lawful and mercantile concerns.

Now Know Ye that We, reposing special trust and confidence in the discretion and faithfulness of our Trusty and Well-beloved

KENNETH ALFRED GREENE,
Esquire, OBE,

have nominated, constituted and appointed, as We do by these Presents nominate, constitute and appoint him, the said

Kenneth Alfred Greene, to be
OUR CONSUL GENERAL OF CANADA IN THE
UNITED STATES OF AMERICA

as aforesaid, hereby giving and granting unto him Full Power and Authority by all lawful means to aid and protect those Canadian citizens who may trade with or visit or reside within his Consular District, and to hold the said office during Our pleasure with all rights, privileges and immunities

Thereunto appertaining

And We do hereby strictly enjoin and require all Canadian citizens to take due notice of this Our Commission and yield obedience thereto.

In Testimony Whereof We have caused these our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed.

Witness:

Our Right Trusty and Well-beloved Cousin, Harold Rupert Leofrice George, Viscount Alexander of Tunis, Knight of Our Most Noble Order of the Garter, Knight Grand Cross of Our Most Honourable Order of the Bath, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Companion of Our Most Exalted Order of the Star of India, Companion of Our Distinguished Service Order, upon whom has been conferred the Decoration of the Military Cross, Field Marshal in Our Army, Governor General and Commander in Chief of Canada.

At Our Government House, in Our City of Ottawa, this Eighth day of December in the year of Our Lord, One thousand nine hundred and forty-nine and in the Thirteenth year of Our Reign.

BROOKE CLAXTON
Acting *Secretary of State for External Affairs*

GORDON BRADLEY
Secretary of State of Canada

BY COMMAND

Recorded 19th October, 1950. Lib. 467. Fol. 170.

C. STEIN
Deputy Registrar General of Canada

November 17, 1952

Excellency:

I have the honor to acknowledge the receipt of your note No. 802 of November 10, 1952, concerning the action commenced in the District Court of the United States for the Northern District of New York by Arthur Oster and Dorothy Oster, Plaintiffs, against the Dominion of Canada, Defendant, for abatement of a nuisance, mandatory injunction, and damages, in connection with the construction and operation of Gut Dam.

You requested that Canada be recognized as enjoying sovereign immunity from suit in the courts of the United States in connection with this and other actions arising out of the construction or operation of Gut Dam.

The Instruments of Approval of the Secretary of War of August 18, 1903, and October 10, 1904, contain two conditions, the second of which you will recall, reads as follows:

"2.—That if the construction and operation of the said dam shall cause damage or detriment to the property owners of Les Galops Island, or to the property, of any other citizens of the United States, the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damages may be brought."

His Excellency
Hume Wrong,
Ambassador of Canada

It seems clear to me that the Dominion of Canada by accepting the permits with the above-quoted condition and constructing the dam pursuant thereto agreed to submit itself to the jurisdiction of the appropriate courts of the United States where suit was instituted by an American citizen for damages arising from the construction or operation of the Dam. Moreover, apart from the question of waiver, I consider that the action instituted by the Osters is essentially an action involving real property located in the United States. It is a well recognized principle of international law that the doctrine of sovereign immunity has no applicability to suits involving rights or interests in or to the use of real property located in the state of the forum.

Since this appears to be an action of a kind in which a foreign government may be made a party defendant in the courts of the United States, and since, in any event the Canadian Government has consented to be sued in cases of this nature, I regret that my Government cannot comply with Your Excellency's request that steps be taken to have a suggestion of immunity made to the Court.

With respect to Your Excellency's suggestion of a uniform procedure for the settlement of all claims arising out of the construction and operation of Gut Dam, I will be pleased to arrange for discussions between representatives of your Government and of the United States concerning this question.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State.

s/ JACK B. TATE

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SUPREME COURT OF THE UNITED STATES

WILLIAM L. CLAY, et al., *Petitioners,* vs. DOMINION OF CANADA, *Respondent.*	No. 821-OT-1956
WILLIAM L. CLAY, JR., *Petitioner,* vs. DOMINION OF CANADA, *Respondent.*	
ANGELO R. SANTORA, *Petitioner,* vs. HER MAJESTY ELIZABETH as of right Queen of Canada, and Canada, *Respondents.*	
ARTHUR SHAUGHNESSY and ANNE SHAUGHNESSY, *Petitioners,* vs. HER MAJESTY ELIZABETH QUEEN OF CANADA and CANADA, *Respondents.*	

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys that the appendix to the brief for Arnold D. P. Heeney, Ambassador of Canada to the United States, to be filed as *amicus curiae* in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit in the above actions will include a copy of the letter from Jack B. Tate, Esq., for the Secretary of State, to His Excellency Hume Wrong, Ambassador of Canada to the United States, of November

17, 1952 in regard to the action of *Oster v. Dominion of Canada.*

Dated, New York, N. Y., April 4, 1957.

INZER B. WYATT

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